35144-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RYAN S. ROBISON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in concluding Mr. Robison was guilty of second degree theft

2. The court erred in concluding Mr. Robison was guilty of burglary.

B. ISSUES

1. An alleged victim stated that he was working in a hotel when his work laptop was stolen and that the laptop, including installed software, was worth $3000. Is this evidence sufficient to prove beyond reasonable doubt that the laptop was worth more than $750?

2. A surveillance video showed the accused walking in and out of the equipment room of a hotel the day before the hotel's "grand opening." Is this sufficient evidence of unlawful entry to prove beyond reasonable doubt that the accused entered the hotel unlawfully?

C. STATEMENT OF FACTS

Victor Cummings was working in the Davenport Grand Hotel when he discovered his laptop computer was missing. (CP 2) He reported

to the police that "the computer had specialized programs on it and the value of the computer and programs to be valued at approximately $3000.00." (CP 2)

Officer Casey Jones took Mr. Cummings's statement, and together they viewed surveillance footage which showed someone, later determined to be Mr. Robison, walking into the hotel equipment room and later walking out carrying a bag that Mr. Cummings identified as his laptop bag. (CP 3) A few days later, Officer Jones saw Mr. Robison and placed him under arrest. (CP 3) According to Officer Jones, Mr. Robison admitted stealing the laptop. (CP 3)

Mr. Robison was charged with second degree theft and second degree burglary. (CP 1, 3) He was subsequently admitted to the drug court treatment program. (RP 8, 14) About a year later he was transferred to the Mental Health Court program. (CP 19; RP 14-15)

The Mental Health Court held a hearing a few months later. (CP 20) After reviewing Mr. Robison's file and hearing recommendations from treatment provider John O'Neill, Deputy Prosecuting Attorney Mary Ann Brady, defense counsel Richard Wallis, and Mr. Robison, the court terminated Mr. Robison from the program. (CP 24-25; RP 15-25)

The matter proceeded to trial, which was very brief, and the court found Mr. Robison guilty as charged:

> THE COURT: All right. And Mr. Wallis, Ms. Brady had dropped off previously for me the police reports. I also have the Affidavit of Facts. Any argument on any of that?
>
> MR. WALLIS: No, Your Honor.
>
> THE COURT: Counsel, with that then the Court will indicate, again, I've read the reports and the affidavits and will find Mr. Robison guilty as charged, second-degree burglary and second-degree theft other than a firearm or a motor vehicle.

(RP 27) The Statement of Investigating Officer Affidavit of Facts was filed on June 25; no other evidence appears in the record. (CP 2-4)

D. ARGUMENT

A person who makes various stipulations as a precondition to being accepted into a court treatment program does not thereby give up his right to have the court make an independent determination of guilt in the event he is terminated from the program. *State v. Drum*, 168 Wn.2d 23, 34, 225 P.3d 237 (2010).

> By entering a drug court contract, a defendant is not giving up his right to an independent finding of guilt beyond a reasonable doubt. A trial court still has the authority to find the defendant not guilty if it determines that the stipulated evidence does not establish all elements of the crime beyond a reasonable doubt.

Id. The stipulation by the accused "to the sufficiency of the evidence [is] not binding on either the trial court or the Court of Appeals." *Id*.

Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Longshore,* 141 Wn.2d 414, 420–21, 5 P.3d 1256 (2000). All reasonable inferences are drawn in the State's favor. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Direct and circumstantial evidence carry the same weight. *State v. Varga,* 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

1. THE EVIDENCE OF VALUE IS INSUFFICIENT TO SUPPORT THE SECOND DEGREE THEFT CONVICTION.

"The legislature defines the elements of a crime." *State v. Tinker*, 155 Wn.2d 219, 221, 118 P.3d 885 (2005). The second degree theft statute states, in relevant part: "[A] person is guilty of theft in the second degree if he or she commits theft of: (a) Property or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value . . . ." RCW 9A.56.040(1). " 'Value' means the market value of the property or services at the time and in the approximate area of the criminal act." RCW 9A.56.010.

"Market value" is the price that a well-informed buyer would pay to a well-informed seller. *State v. Kleist,* 126 Wn.2d 432, 435, 895 P.2d 398 (1995). It is, however, well established in this state that an owner of property may testify to the property's value " 'whether he [or she] is generally familiar with such values or not.' " *State v. Hammond,* 6 Wn. App. 459, 461, 493 P.2d 1249 (1972) (quoting 3 John Henry Wigmore, Evidence in Trials at Common Law § 716, at 56 (James H. Chadbourn rev. ed.1970)).

Market value is the price a well-informed buyer would pay to a well-informed seller when neither is obliged to enter into the transaction. *Kleist,* 126 Wn.2d at 435; see also *State v. Farrer,* 57 Wn. App. 207, 787 P.2d 935 (1990). Evidence of the retail price of the stolen property alone may be sufficient to establish the value of the property. *State v. Ehrhardt,* 167 Wn. App. 934, 944, 276 P.3d 332 (2012). And, "[t]he price paid for an item of property, if not too remote in time, is proper evidence of value." *State v. Melrose,* 2 Wn. App. 824, 831, 470 P.2d 552 (1970). The State need not present direct evidence of the value of stolen property; rather, "the jury may draw reasonable inferences from the evidence, including changes in the condition of the property that affect its value." *Ehrhardt,* 167 Wn. App. at 944. The trier of fact may also rely on its "ordinary

experience and knowledge" when determining the market value of stolen property from the evidence presented. *Melrose,* 2 Wn. App. at 832.

According to the Affidavit of Facts, Mr. Cummings could testify "[t]hat his work laptop (Dell Latitude E5530) and the black synthetic leather bag was inside the equipment room which was inside of the Grand Hotel." (CP 2) He could also testify that he advised police "the computer had specialized programs on it and the value of the computer and programs to be valued at approximately $3000.00." (CP 2) No other evidence was presented as to the value of the stolen property.

Mr. Cummings's statements do not purport to state the price paid for the computer or its contents. He provided no information as to the nature of the specialized programs or what value he would attribute to them. He did not indicate when or how he acquired the laptop. Nothing in the record suggests the court had any ordinary experience that would enable it to determine the market value of the laptop. Neither the computer itself nor the video that allegedly showed the theft of the computer was introduced into evidence. And apart from Mr. Cummings's statement that the stolen property was "his work laptop," he did not state he was the actual owner of the laptop which, being used in his work, could as easily have been the property of his employer.

Even viewed in the light most favorable to the State, the evidence in this record is insufficient to permit a reasonable trier of fact to find beyond a reasonable doubt that the stolen laptop had a value greater than $750.

2. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE BURGLARY CONVICTION.

"A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030. "A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(2). A lawful entry, even one accompanied by nefarious intent, is not by itself a burglary. *State v. Allen*, 127 Wn. App. 125, 137, 110 P.3d 849 (2005).

To establish that an entry is unlawful, the State must introduce evidence as to the occupancy or possession of the premises at the time the burglary was committed. *State v. Schneider,* 36 Wn. App. 237, 241, 673 P.2d 200 (1983) (citing *State v. Klein,* 195 Wash. 338, 342, 80 P.2d 825 (1938)). The offense of burglary is designed to protect the dweller. *Schneider*, 36 Wn. App. at 241. Evidence as to the ownership or occupancy of the premises allegedly broken into must be presented so as

to negate the defendant's right to enter. *Klein,* 195 Wash. at 341. Washington law has long held that the test for determining ownership is not one of legal title but one of occupancy or possession of the premises at the time the burglary was committed. *Schneider,* 36 Wn. App. at 241; see also *Levesque v. State*, 63 Wis. 2d 412, 415–16, 217 N.W.2d 317 (1974) ("To constitute the crime of burglary . . . one must enter the building without the consent of the person in possession. . . . It is the extent and scope of the consent of the one in possession which determines the legality of the entry and presence of the public within the structure.")

No evidence was provided to the court to enable a determination as to the person or entity who could invite, license, or extend to anyone the privilege to enter the hotel. Mr. Cummings identified himself as a person who was working in the hotel. This is insufficient to support the inference that he was in possession of the premises and entitled to invite or exclude anyone from the building.

No evidence indicates the Davenport Grand Hotel was locked or otherwise secured to prevent entry by the public. No evidence indicates how Mr. Robison entered the hotel. The Affidavit of Facts states, "It should be noted that the Hotel was not open to the public as the grand opening was the next day (6/17)." (CP 2) But there is no evidence as to who provided this information. The alleged scheduling of a "grand

opening" does not, by itself, indicate that the public, or any particular individual, is excluded prior to the scheduled "grand opening."

The State failed to carry its burden of proving Mr. Robison entered or remained unlawfully in the hotel.

3. ANY REQUEST FOR COSTS SHOULD BE DENIED IF THE STATE PREVAILS.

This Court has broad discretion to disallow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). An offender's inability to pay is an important consideration in deciding whether to disallow costs. *Sinclair*, 192 Wn. App. at 389.

RAP 15.2(f) requires a party who has been granted an order of indigency by the trial court to notify the court of any significant improvement in financial condition. *Sinclair*, 192 Wn. App. at 393. Otherwise, the indigent party is entitled to the benefits of the trial court order of indigency throughout the review process. *Id.*; RAP 15.2(f).

Mr. Robison has filed an affidavit in the District Court showing he has no assets, he is unemployed, and his sole income is from Social Security disability payments and food stamps. (CP 43) He is indigent and unable to pay the costs of this appeal. (CP 42-44) He is currently

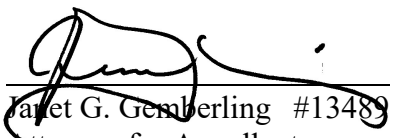
incarcerated. There is no evidence his financial condition has improved. Any request for an award of costs should be denied.

E. CONCLUSION

The evidence provided to the court was insufficient to support the burglary and theft convictions. The charges should be reversed and dismissed.

Dated this 18th day of August, 2017.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 35144-1-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
RYAN S. ROBISON,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on August 18, 2017, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Brian O'Brien
scpaappeals@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on August 18, 2017, I mailed a copy of the Appellant's Brief in this matter to:

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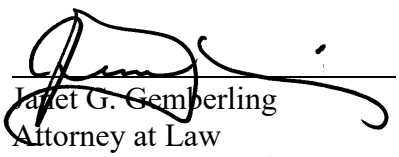
Signed at Seattle, Washington on August 18, 2017.



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